Supreme Court, U.S.
FILED
01 816 NOV 0 1 2001
OFFICE OF THE CLERK

No. 00-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

JOE HARRY PEGG,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MICHAEL S. PASANO
Zuckerman, Spaeder,
Taylor & Evans
Suite 900
201 S. Biscayne Boulevard
Miami, FL 33131
(305) 579-0110

WILLIAM J. GENEGO*
Nasatir, Hirsch, Podberesky
& Genego
2115 Main Street
Santa Monica, CA 90405
(310) 399-3259

Counsel for Petitioner
JOE HARRY PEGG

* Counsel of Record

38pp

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding petitioner was required to prove his lawyer's actual conflict adversely affected his performance in order to establish a Sixth Amendment violation, where the conflict was based on the lawyer having engaged in criminal conduct related to the charges against his client?

2. Did the Court of Appeals err in holding petitioner was required to prove his lawyer advised him to plead guilty because it was consistent with the lawyer's personal interest, and for no other reason, in order to establish the lawyer's actual conflict adversely affected his performance under *Cuyler v. Sullivan*, where the lawyer admitted his advice to petitioner was affected by his own personal interest?

3. Did the Court of Appeals err in holding petitioner was required to satisfy the "adverse effect" test for multiple representation conflicts established by *Cuyler v. Sullivan*, in order to establish his lawyer's self-interest conflict violated the Sixth Amendment?

PARTIES TO THE PROCEEDINGS

Petitioner Joe Harry Pegg was the petitioner in the district court and appellant in the Court of Appeals for the Eleventh Circuit. Before the district court, the respondent was the United States of America. The Court of appeals for the Eleventh Circuit identified the appellee as being the United States of America, and it is the only respondent in this Court.

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ORDERS OF THE DISTRICT AND CIRCUIT COURT

The November 3, 2001 order of the Court of Appeals for the Eleventh Circuit denying petitioner's petition for rehearing is unreported. A copy is reproduced as Appendix A. The June 12, 2001 opinion of the Court of Appeals affirming the district court's denial of petitioner's motion pursuant to 28 U.S.C. section 2255 to vacate his conviction is reported at 253 F.3d 1274. A copy is reproduced as Appendix B. The district court's opinion and order denying petitioner's section 2255 motion is reported at 49 F. Supp.2d 1322. A copy is reproduced as Appendix C.

JURISDICTION

Petitioner invoked the jurisdiction of the district court by filing a motion pursuant to 28 U.S.C. section 2255. Petitioner filed a timely notice of appeal and invoked the jurisdiction of the Court of Appeals pursuant to 28 U.S.C. sections 1291 & 2253. On August 3, 2001, the Court of Appeals denied petitioner's timely filed petition for rehearing and the Court declined petitioner's suggestion of en banc review.

The jurisdiction of this Court to review the orders of the Eleventh Circuit is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI, U.S. Constitution

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

Preliminary Statement

James Sharp, the lawyer who advised Joe Pegg to plead guilty, had a personal stake in the outcome. If Pegg continued on his intended path of proceeding to trial, Sharp would be disqualified, and the motion the government would file to have him disqualified would disclose publicly that Sharp had worked with Pegg in an attempt to obstruct justice and suborn perjury to gain Pegg's acquittal. Further, if Pegg proceeded to trial, the government would present evidence of Sharp's alleged crimes. That evidence would become a part of the public record for ever after, insuring the personal and professional fallout for Sharp would not end with the trial.

The government communicated to Sharp that alternatively, if Pegg changed his mind and plead guilty, Sharp would be allowed to continue to represent Pegg. The government would not seek his disqualification, and there would be no public disclosure or public record of the allegations against Sharp or the evidence that supported them.

Two weeks after firmly announcing his client would accept no plea offers, Sharp stood before the judge on the morning of trial and asked for a ten day continuance, representing he was confident a plea disposition could be reached. The court instead gave Sharp twenty-four hours. That began what Sharp described as the most frantic, emotionally charged period of his professional career. Pegg expressed surprise, anger and disappointment, alternately insisting upon trial and asking Sharp to tell him what he should do. It ended with Pegg entering a plea pursuant to an agreement that had literally been constructed from scratch, and which resulted in Pegg being sentenced to thirty years imprisonment.

The District Court and Court of Appeals acknowledged Sharp's representation of Pegg occurred under the cloud of an actual conflict, which Pegg had never waived. Both courts also agreed that the alternative to pleading guilty - trial - was a viable and reasonable alternative under the facts.

Sharp admitted at the post-conviction evidentiary hearing that he considered his own-self interest in advising Pegg. Sharp, however, maintained he had put his own interests second to Pegg's, and identified factors other than his personal interest that he thought weighed in favor of Pegg not proceeding to trial. Based on Sharp's testimony that his personal interest was not the reason he advised Pegg to plead guilty, the Court of Appeals ruled Pegg had

failed to establish a violation of his Sixth Amendment right to conflict-free counsel.

The "adverse effect" test applied by the Court of Appeals conflicts with the adverse effect test of at least three other circuits, all of which would have entitled Pegg to relief. In fact, in the Second Circuit, the attorney-client crime conflict between Sharp and Pegg would have been deemed *per se* prejudicial, making it unnecessary to prove adverse effect.

The adverse effect test applied by the Court of Appeals was adopted for mutual representation conflicts, not lawyer self-interest conflicts. Under the adverse effect test applied by the Court of Appeals, no petitioner could demonstrate adverse effect from a lawyer's self-interest conflict. That means either the Court of Appeals applied the test incorrectly, or a different test has to be established for lawyer self-interest conflicts.

STATEMENT OF THE CASE

A. Proceedings In The District Court

On March 29, 1994, petitioner and other defendants were charged in a two count indictment returned in the Middle District of Florida with conspiring to import marijuana in November, 1988 and April, 1989. App C 18. Petitioner was represented by James E. Sharp, a Washington, D.C. lawyer. App C 18. Sharp selected Tampa attorney John Fitzgibbons to be local counsel. It was understood Fitzgibbons was not being retained to assist Sharp in the development or preparation of the defense, or to actually participate in the trial. App C 19.

Approximately two weeks before the November 28 trial date, Sharp notified the government that petitioner would not accept a plea offer and would proceed to trial. A few days later, on November 18, 1994, Collazo "faxed" Sharp a "proposed" motion to disqualify him (and his partners) from representing petitioner at trial. App C 120-21. The motion was not filed with the court. App C 23.

The government's proposed motion revealed it had evidence that "Sharp was involved in unethical and criminal conduct related to the charges for which petitioner was to stand trial." App C 21. Specifically, the motion detailed that cooperating witness Reggie Baxter would testify to Sharp's participation and role "in concocting" a

version of events for Baxter to tell DEA agents as part of his supposed cooperation. App C 21-22. The government maintained this evidence created a conflict for Sharp that petitioner could not waive.

The government's proposed request for Sharp's disqualification, however, was conditioned upon petitioner proceeding to trial. If petitioner went to trial, the government would move to have Sharp disqualified; if petitioner instead plead guilty, the government would not seek Sharp's disqualification. App C 22. The government's proposed motion became Sharp's primary focus and concern, to the exclusion of preparing for trial. App C 24.

On the morning petitioner's trial was to commence, co-defendant Bernard Gechtman entered a plea of guilty. The factual basis for Gechtman's plea included a statement that implicated petitioner in one of the alleged importations. Gechtman, however, did not enter into a plea agreement with the government, and instead plead "straight up." App C 25.

When petitioner's case was called for trial, Sharp told the court he believed a plea disposition could be reached and requested a ten day continuance. The court gave him 24 hours. App C 26.

Sharp, and his partners Lankford and Knight, met with petitioner the evening of November 28. Petitioner, who expected to go to trial, was described as "very upset," "troubled," "frantic," about the sudden change of events. He continued to express a desire to go trial. App C 27. Sharp admitted he considered the consequences to himself personally in counseling petitioner. He maintained, however, that he placed petitioner's interests first. App C 26.

Petitioner plead guilty the following morning under an agreement which required him to plead to one count, cooperate with the government and provide complete and truthful cooperation and forfeit $4 million by June 1, 1995. In return, the government would dismiss the other count, not file second offender papers and conditionally recommend acceptance of responsibility, and the government had the right to seek an upward adjustment based on petitioner's role in the offense. If petitioner was able to provide cooperation the government considered "substantial assistance," it might recommend a downward departure. App C 26-27.

DEA Agent Sam Murad believed Sharp had engaged in criminal conduct. However, after petitioner's guilty plea, Murad reasoned "[t]here was nothing further to pursue," and did not plan further investigation. Doc 405 Pg 63 (Murad)

In the following months, petitioner attempted but failed to comply with the forfeiture condition of his plea agreement. As a consequence, the government cut-off his debriefing and filed a motion to have him sentenced.

Sharp did not appear at petitioner's sentencing, even though he was still counsel of record. When petitioner was brought to court, his first time in court since pleading guilty, he moved to withdraw the plea. The court denied the motion. App C 33.

Local counsel Fitzgibbons appeared with petitioner at sentencing and orally requested a continuance to allow petitioner further time to accomplish the required forfeitures. In explaining why the terms of the plea had not yet been accomplished, Fitzgibbons told the court that petitioner had been "placed in an untenable situation before he plead guilty because of the accusations against his attorneys." App C 32-33. The court denied the continuance and sentenced petitioner to 360 months imprisonment. App B 4.

B. Post-Conviction Proceedings

In early February, 1997, Florida attorney William F. Jung sent Sharp & Lankford a draft section 2255 motion Jung had prepared for petitioner. The draft motion quoted and reiterated Baxter's accusations against Sharp from the government's proposed disqualification motion. Promptly

upon receiving the draft, Sharp & Lankford sent a letter to Jung telling him that if the memorandum were filed, the firm would "consider all privileges waived," and "shall sue civilly, seek Rule 11 sanctions, and initiate bar disciplinary proceedings against those who are a party to it." Pet's Exh 11.

On February 18, 1997, with the assistance of new counsel, petitioner filed a motion pursuant to 28 U.S.C. section 2255 to vacate his conviction and sentence. The grounds stated for relief included the denial of petitioner's Sixth Amendment right to effective assistance of counsel due to his attorney's actual conflict.[1] After the government filed an opposition to the motion and petitioner filed a reply, an evidentiary hearing was conducted. App B 4.

The district court ruled Sharp had an actual conflict which petitioner had not waived. App C 38-39. The court also acknowledged that where a defendant is represented by counsel who is alleged to have participated "in criminal conduct related to the crimes against the defendant," the resulting actual conflict entitles the defendant to relief without the need to show the conflict adversely affected counsel's performance. The court, however, said the rule

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[1] The motion sought relief on two additional grounds, denial of presentence motion to withdraw guilty plea, and government breach of plea agreement, neither which were pursued beyond the district court.

was inapplicable here because it accepted as true Sharp's unrebutted testimony at the evidentiary denying that Baxter's allegations were false. App C 40. The court also ruled that petitioner had not demonstrated the conflict "adversely affected" counsel's performance. The court agreed that trial was a reasonable and viable alternative strategy for petitioner to pursue, but ruled the record did not establish the alternative of trial was not undertaken "due to" the conflict, or that it was inherently in conflict with Sharp's loyalties or interests. App C 41.

C. Proceedings In The Court of Appeals

In a published opinion, the Court of Appeals affirmed the district court. App B. The Court held that to be entitled to relief, petitioner was required to prove his counsel's actual conflict adversely affected his performance. To prove adverse effect, petitioner had to establish (1) there was a plausible alternative defense strategy that might have been pursued, (2) which was reasonable under the facts, and (3) a link between the actual conflict and the decision to forgo the alternative strategy. To establish the "link," petitioner had to prove the alternative strategy was not undertaken "due to" the conflict or that it was inherently in conflict with the conflicting interest. App B 10.

The Court of Appeals ruled petitioner had failed to establish the required "link," and relied on three facts.

First, "the plan under which [petitioner] was to plead guilty was devised by Fitzgibbons, an attorney who did not act under any conflict." App B 11. Second, all of petitioner's lawyers concurred in the recommendation. App B 11. Third, if petitioner had not plead guilty, "Getchman, a co-conspirator turned government witness, would have testified against [petitioner] at trial and his testimony would have been devastating to [petitioner's] case." App B 12.

The record demonstrates all three facts are clearly erroneous. First, Fitzgibbons specifically testified the plan for petitioner to plead guilty was ***not*** devised by him but by Sharp. Doc 405 Pg 40-41 (Fitzgibbons) Second, Knight, one of petitioner's lawyers, testified he believed the plea was not in petitioner's best interest, because its terms could not be fulfilled and Knight communicated his view to Sharp. Doc 397 Pg 182-183, 233-34 (Knight). Third, Getchman had not "turned government witness." As the district court noted, Getchman did not even have a plea agreement. App C 25.

The Court of Appeals also held that the *per se* reversal rule of the Second Circuit which petitioner urged the Court to adopt did not apply to his case, for the same reason given by the district court. App B 13-14.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals Erred In Holding The Attorney-Client Crime Conflict Between Petitioner And His Counsel Was Not Subject To The *Per Se* Prejudice Rule For Sixth Amendment Violations

A. Certain types of impairments on the right to counsel are subject to a *per se* prejudice rule.

Infringement on a defendant's right to counsel ordinarily must be proved to be prejudicial for the infringement to constitute a constitutional violation. *Strickland v. Washington*, 466 U.S. 668, 692 (1984) In certain instances, however, prejudice is presumed due to the nature of the infringement. The "[a]ctual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice," as are "various kinds of state interference with counsel's assistance." *Strickland*, 466 U.S. at 692 (citation omitted)

A distinguishing feature common to this category of infringements is that "[p]rejudice . . . is so likely that a case-by-case inquiry into prejudice is not worth the cost." *Strickland*, 466 U.S. at 692. Additionally, they "involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is

directly responsible, easy for the government to prevent." *Id.*

B. Attorney-client crime conflicts should be subject to a *per se* prejudice rule.

Actual conflicts generally are subject to a limited presumption of prejudice. *Strickland*, 466 U.S. at 692. One specific type of actual conflict, however, has been held to be subject to the *per se* rule of prejudice - - "[w]hen a government witness alleges that the defendant's counsel engaged in criminal conduct related to the charges for which the defendant is not trial," the resulting actual conflict is subject to the *per se* prejudice rule, unless "the attorney is demonstrably innocent and the government witness's allegations are plainly false." *United States v. Fulton*, 5 F.3d 605, 610 (2d Cir. 1993); *United States v. Cancilla*, 725 F.2d 867, 870 (2d Cir. 1984).

This type of conflict is "of a different character than other conflicts," as it "involves a bias arising out of counsel's powerful self-interest in avoiding criminal charges or reputational damage . . ." *Fulton*, 5 F.3d at 613. Not only is the corrupting influence of the conflict stronger, but its scope is much broader:

> Where a government witness implicates defense counsel in a related crime, the resulting conflict so permeates the defense that no

> meaningful waiver can be obtained. In such a case, we must assume that counsel's fear of, and desire to avoid, criminal charges, or even the reputational damage from an unfounded but ostensibly plausible accusation, will affect virtually every aspect of his or her representation of the defendant.

Fulton, 5 F.3d at 613 (emphasis added).

Application of the *per se* rule of prejudice to this attorney-client crime conflicts is also appropriate because they exhibit the characteristics that make application of the *per se* rule appropriate to other types of impairments.

First, "[p]rejudice . . . is so likely that case-by-case inquiry into prejudice is not worth the cost." *Strickland*, 466 U.S. at 692 (citation omitted). As case law confirms, given the scope of the conflict and the powerful influence of self-preservation, prejudice is virtually inevitable. *See United States v. Ross*, 33 F.3d 1507, 1524, n.29 (11th Cir. 1994); *United States v. Greig*, 967 F.2d 1018, 1022-23 (5th Cir. 1992); *Govt. of Virgin Islands v. Zepp*, 748 F.2d 125, 136 (3rd Cir. 1984); *United States v. White*, 706 F.2d 506 (5th Cir. 1983).

Most, if not all of these cases, never would have arisen with a *per se* prejudice rule. For example, a *per se* rule would have prevented this case, because it would have

required Sharp's disqualification regardless of whether petitioner went to trial or plead guilty. The existence of this case, and others like it, thus illustrate the high cost of a case-by-case determination of prejudice.

Second, as evidenced by this case, the "prosecution is directly responsible" for the impairment, and it is an impairment that is "easy for the government to prevent." *Strickland*, 466 U.S. at 692 (citation omitted). The prosecution was responsible for the conflict in the sense that it intended to call Baxter to testify to Sharp's criminal conduct, knowing the conflict it would create. The government could have easily prevented it, by moving to disqualify Sharp without conditioning it on whether petitioner plead guilty.

Further, the *per se* prejudice rule is appropriate because attorney-client crime conflicts are sufficiently disabling as to render them equivalent to the constructive denial of the right to counsel. *Fulton*, 5 F.3d at 611, *citing*, *Strickland*, 466 U.S. at 692.

C. *Fulton* applies to the attorney-client crime conflict in this case.

The District Court accepted *Fulton's* holding that attorney-client crime conflicts are subject to a *per se* prejudice rule, and the Court of Appeals accepted that the *per se* rule might be applicable to such conflicts. App C 40;

App B 14. Both courts, however, believed petitioner's case was not subject to *Fulton* based on the district court's determination to "accept Sharp's uncontroverted testimony [at the post-conviction evidentiary hearing] that Baxter's allegations were false." App B 1279.

The Court of Appeals believed this determination by the district court made *Fulton* inapplicable, because *Fulton* says that where it is determined the allegations against the lawyer are false, a waiver is possible. App B 1279, *citing, Fulton*, 5 F.3d at 613. The Court mistakenly equated the pretrial determination that *Fulton* requires for a meaningful waiver, with the post-conviction determination the district court made in this case.

Fulton provides that a "if a district court holds a full hearing and can definitively rule out the possibility that the allegations are true, a meaningful waiver is possible . . ." *Fulton*, 5 F.3d at 613. As *Fulton* explains, a waiver is possible in that circumstance because the district court's determination changes the nature of the conflict by assuring the lawyer he no longer needs to be concerned with defending himself against criminal liability. The all pervasive conflict that exists when a lawyer is concerned with defending himself, and which *Fulton* says cannot be waived by the defendant under any circumstances, becomes a narrowly confined conflict, as "the falsely accused attorney is conflicted only to the extent she cannot cross-examine the witness regarding the false allegations." *Fulton*,

5 F.3d at 613.

A post-conviction determination that the allegations are false cannot be equated with a determination made pretrial, because the post-conviction determination does not and cannot change the nature of the conflict *post hoc*. The nature of Sharp's actual conflict at the time he was representing petitioner made the *per se* rule of *Fulton* applicable. The district court's determination five years later to accept Sharp's testimony that the allegations were false, does not change the nature of the conflict as it existed at the time of the representation in 1994, nor does it affect the applicability of the *per se* prejudice rule to the conflict.

The Court of Appeals also mistakenly read *Fulton* to apply only at trial. App B 13-14. ("the accusation in *Fulton* that counsel was involved in the alleged crime would seem to affect counsel's handling of the trial.") The Court offered no explanation why the allegations would affect counsel's "handling of the trial," but not affect the decision whether to go to trial at all. In any event, the Court of Appeals misread *Fulton*, as the court there explicitly recognized the allegations affect counsel's ability to advise the defendant about whether to plead guilty or go to trial. *Fulton*, 5 F.3d at 610 ("the attorney is not in a position to give unbiased advice to the client about such matters as ***whether or not to*** testify or to ***plead guilty*** and cooperate since such testimony or cooperation from the defendant may

unearth evidence against the attorney.")

Contrary to the ruing of the Court of Appeals, *Fulton* applies to the attorney-client crime conflict in this case, and the Second Circuit's *per se* prejudice rule for such conflicts as reflected by *Fulton*, should be adopted.

II.
The Court of Appeals Erred In Ruling That Because Petitioner's Lawyer Identified Reasons Other Than His Self-Interest To Advise Petitioner To Plead Guilty, Petitioner Had Failed To Establish His Lawyer's Conflict Adversely Affected His Performance

A. An "actual conflict adversely affects" counsel's performance if it "impairs" the defense, "influences" counsel's strategic decisions, or prevents counsel from pursuing a client's interest "single-mindedly."

To establish a violation of the Sixth Amendment right to counsel based on a conflict of interest, "a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Strickland v. Washington*, 466 U.S. at 692, *quoting*, *Sullivan*, 446 U.S. at 348. The Court first articulated this standard in stating the holding of

Sullivan: "We hold that the possibility of a conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict adversely affected his lawyer's performance." *Id.*, 446 U.S. at 350 (emphasis added).

Sullivan used *Glasser v. United States*, 315 U.S. 60 (1942), as an example of where an actual conflict adversely affected counsel's performance. In *Glasser*, two defendants, Glasser and Kretske, were initially represented by separate counsel. During trial, Kretske dismissed his lawyer. The trial judge then appointed Glasser's lawyer Stewart to represent Kretske also. After becoming counsel for both Glasser and Kretske, Stewart failed to cross-examine a government witness who tied Glasser to the conspiracy and failed to object to the admission of arguably inadmissible evidence. The Court viewed those failures to be the result of Stewart's desire to protect Kretske's interests by diminishing the jury's perception of his guilt and was thus "indicative of Stewart's struggle to serve two masters . . . ." *Glasser*, 315 U.S. at 75. The Court in *Sullivan* explained that "[s]ince this actual conflict impaired Glasser's defense, the Court reversed his convictions." *Sullivan*, 446 U.S. at 349 (emphasis added).

The Court in *Sullivan* made explicit that the adverse effect standard did not require a showing of prejudice, that is, a showing the conflict affected the outcome of the

proceeding. *Sullivan*, 446 U.S. at 349, *citing*, *Glasser*, 315 U.S. at 76. Rather, as *Strickland*, later explained, the showing of adverse effect required by *Sullivan* provides a basis for presuming the conflict was prejudicial. *Id.*, 466 U.S. at 692.

Wood v. Georgia, which followed *Sullivan*, provided further guidance as to the meaning of "adverse effect." In *Wood*, an owner of an adult book store had paid for a lawyer to defend employees of his store who were charged with crimes committed in connection with their employment. The employer continued to pay the lawyer to represent the employees at a probation revocation hearing arising out of their failure to pay the fines imposed upon their convictions. On these facts, the Court expressed its concern that the lawyer "may not have pursued their interests single-mindedly." *Id.*, 450 U.S. at 271-272 (emphasis added).

The Court ordered a remand to the state court to determine if the defendants right to counsel was violated by an actual conflict. The question that needed to be answered to make that determination, as stated by the Court, was "whether counsel was influenced in his basic strategic decisions by the interests of the employer who hired him." *Id.*, 450 U.S. at 272 (emphasis added).

B. According to the Court of Appeals, an actual conflict adversely affects counsel's performance only if the conflict can be proved to have caused counsel to forego an alternative strategy.

1. The "link" test for determining adverse effect, as applied by the Court of Appeals, is inconsistent with *Sullivan* and excludes meritorious claims.

To demonstrate Sharp's actual conflict "adversely affected" his performance, the Court of Appeals required petitioner to show: "(1) the existence of a plausible alternative defense strategy or tactic that might have been pursued; (2) that the alternative strategy or tactic was reasonable under the facts; and (3) a link between the actual conflict and the decision to forgo the alternative strategy of defense." App B 10, *citing, Freund v. Butterworth*, 165 F.3d 839, 860 (11th Cir. 1999) (*en banc*). To "link" that petitioner was required to establish was that the alternative strategy "was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." App B 10, *citing, Freund*, 165 F.3d at 860.

The origin of this link test for "adverse effect" actually precedes *Sullivan*, and was originally articulated as a formulation for determining an actual conflict. *Foxworth v. Wainwright*, 516 F.2d 1072, 1079 (5th Cir. 1975); *Austin v.*

Erickson, 477 F.2d 620, 624 (8th Cir. 1972). Its first post-*Sullivan* use appears to be *Brien v. United States*, 695 F.2d 10, 15 (1st Cir. 1982), where is was still used to define an "actual conflict of interest." It was used again by the First Circuit to define an actual conflict in *United States v. Fahey*, 769 F.2d 829, 836 (1st Cir. 1985). The Third Circuit adopted the formulation of *Fahey* in 1988, and in doing so, described it as a test that "includes both the actual conflict and adverse effects prongs of the conflict of interest analysis." *United States v. Gambino*, 864 F.2d 1064, 1070-1071 (3d Cir. 1988). The link test has since been adopted by other circuits, including the Second, Fourth and Eleventh Circuits. *Mickens v. Taylor*, 240 F.3d 348 (4th Cir.)(*en banc*), *certiorari granted*, 121 S. Ct. 1651 (2001); *Freund*, 165 F.3d at 860. *United States v. Levy*, 25 F.2d 146 (2d Cir. 1994)

The "link" element of the formulation requires a petitioner to show the alternative strategy was not pursued "because" of the conflict. *See, e.g., Lopez v. Scully*, 58 F.3d 38, 42 (2d Cir. 1995). In other words, it requires a showing that "but for" the conflict, the alternative strategy would have been pursued. *See Freund*, 165 F.3d at 866 (rejecting argument that "but for" conflict, counsel would have pursued alternative strategy).

Under this approach, as this case illustrates, the required link cannot be established as long as a plausible reason, other than the conflict, can be identified for not

pursuing the alternative strategy. As a result, the link test limits adverse effect to those circumstances where no plausible reason exists, other than the conflicting interest, for the lawyer not to pursue the alternative strategy. Thus, even if Sharp's self-interest influenced his decision to advise petitioner to plead guilty, or even if Sharp's self-interest was the determining factor for his decision to advise petitioner guilty, Sharp's conflicting self-interest cannot be shown to have adversely affected his performance under the link test applied by the Court of Appeals.

In fact, under the test applied by the Court of Appeals, adverse effect exists only in two circumstances. If there was no plausible reason to support a lawyer's decision between alternative strategies other than the conflicting interest, or where a lawyer chooses between alternative strategies that will affect two clients in the opposite way.

In *Sullivan* and *Wood*, the Court described an "adverse effect" of an actual conflict to include circumstances where a conflict "impaired" the defense, influenced counsel's strategic decisions, or precluded counsel from pursuing the interests of his client "single-mindedly." *Sullivan*, 446 U.S. at 349; *Wood*, 450 U.S. at 271-272. Under the link test applied by the Court of Appeals, none of these circumstances would be deemed to constitute an adverse effect. The link test for adverse

effect applied by the Court of Appeals is therefore inconsistent with *Sullivan*, and it also denigrates the value the Sixth Amendment right to conflict-free counsel, as it allows violations of that right to go unremedied.

2. The "likely affected" standard for adverse effect is consistent with *Sullivan* and limits relief to meritorious claims.

Other circuits read the "adverse effect"of conflicts that *Sullivan* deems presumptively prejudicial more broadly. For example, the Seventh Circuit deems an actual conflict to have adversely affected counsel's performance if but for the attorney's actual conflict, there is "'a [reasonable]likelihood that counsel's performance would have been different." *Stoia v. United States*, 22 F.3d 766, 771 (7th Cir. 1994), *quoting, Frazier v. United States*, 18 F.3d 778, 787 (9th Cir. 1994). The Ninth Circuit deems an actual conflict that "likely affected" counsel's performance with respect to particular aspects of the case to constitute an adverse effect. *United States v. Mett*, 65 F.3d 1531, 1535 (9th Cir. 1995) ("need only show that some effect on counsel's handling of particular aspects of the trial was likely"), *quoting, United States v. Miskinis*, 966 F.2d 1263, 1268 (9th Cir. 1992).

These formulations of adverse effect include within their scope circumstances in which an actual conflict

"influences" counsel's strategic decisions, or "impairs" the defense, or prevents the lawyer from pursuing the interests of his client "single-mindedly." *Sullivan*, 446 U.S. at 349; *Wood*, 450 U.S. at 271-272. At the same time, they do not provide relief based on a showing of an actual conflict alone, or where there the relationship between a conflict and a strategic decision is speculative or tenuous. By striking this balance, the "likely affected" and "reasonable probability" formulations of adverse effect are true to *Sullivan* and provide a sound basis for presuming the actual conflict to be prejudicial.

3. Lawyer self-interest conflicts present special problems in determining adverse effect.

The adverse effect requirement was adopted in the context of a mutual representation conflict and was intended to identify when an actual conflict in the interests of clients represented by the same lawyer should be presumed prejudicial. *Sullivan*, 446 U.S. at 350. As some courts have suggested, the criteria for determining adverse effect from a mutual representation conflict, is not necessarily well-suited for determining adverse effect from a lawyer's self-interest conflict. *See Freund*, 165 F.3d at 886 (Tjoflat, J., dissenting); *Stoia v. United States*, 22 F.3d at 770, n.3 (courts continue to apply same test to both, "even though the fit is less than perfect.")

In a mutual representation conflict, an actual conflict exists when a lawyer is in the position of having to make a strategic decision as to which the interests of his clients diverge. *Gambino*, 864 F.2d at 1070. In that circumstance, the client harmed by the lawyer's decision can prove the conflict caused the lawyer's decision not to pursue the alternative strategy that favored him, because but-for the interests of the other client, there would have been no reason for the lawyer not to pursue the alternative strategy. *See Stoia*, 22 F.3d at 770, n.3.

In a lawyer self-interest conflict, an actual conflict exists when a lawyer is in the position of making a strategic decision on behalf of a client that will affect the lawyer's personal interest differently depending upon the decision. *See Freund*, 165 F.3d at 886 (Tjoflat, J., dissenting). In that circumstance, proving the lawyer's self-interest caused the lawyer's decision not to pursue one alternative strategy over another, is practically impossible, absent an admission. The lawyer must decide which alternative that will advance the interests of the client the most, not between one alternative that will advance the client's interest and another that will harm it. Given that the lawyer is choosing between competing plausible strategic alternatives, the conflict can never be isolated as the cause-in-fact for the lawyer's decision.

Again, this case illustrates the point. The alternatives of trial or plea were not ones that conversely

advanced or harmed petitioner's interests. They were competing plausible alternatives, with arguments for and against each. On the other hand, it was in Sharp's personal interest for petitioner to plead guilty, and contrary to Sharp's interest for petitioner to proceed to trial. Nevertheless, Sharp's personal interest cannot be proved to have caused his decision to advise petitioner to plead guilty under the link test, because other reasons could be given for recommending the alternative of a guilty plea.

Lawyer self-interest conflicts can and often do result in compromised representation, and results which for that reason cannot be considered reliable. Once unheard of, lawyer self-interest conflicts are becoming increasingly common. To require in a lawyer self-interest conflict that a petitioner prove subjectively that the lawyer's self-interest was the cause-in-fact for the lawyer's decision not to pursue a strategic alternative, would be to exempt such conflicts from enforcement and deprive those harmed by them of a remedy. Thus, if the adverse effect standard of *Sullivan* does require a petitioner to demonstrate that the conflict caused counsel's decision not to pursue an alternative strategy, a new standard needs to be established for determining adverse effect for purposes of lawyer self-interest conflicts.

CONCLUSION

The original conflicts rules of *Sullivan* simply don't work well in the context of attorney-client crime conflicts. This fact is well-demonstrated by the split in the Circuits over a *per se* prejudice rule and in the differing adverse effect tests that have emerged. At a time when more lawyers are being investigated and prosecuted, it is important to the criminal justice system that its conflict rules be clear and uncompromising. For all the foregoing reasons, this Court should issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to review the questions presented in this petition.

Respectfully submitted,

MICHAEL S. PASANO
Zuckerman, Spaeder,
Taylor & Evans
201 Biscayne Boulevard,
Suite 900
Miami, Florida 33131
(305) 579-0110

WILLIAM J. GENEGO*
Nasatir, Hirsch,
Podberesky & Genego
2115 Main Street
Santa Monica, CA 90405
(310) 399-3259

Counsel for Petitioner
JOE HARRY PEGG

* Counsel of Record